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IN THE
Supreme Court of the United States
October Term, 1994

FRANK J. KELLEY, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; HERBERT P. READ; NORMAN W. PERMAN; SUSAN KIMMELMAN; THE LAKE MICHIGAN FEDERATION; and DON'T WASTE MICHIGAN,

Petitioners,

v.

IVAN SELIN; JAMES R. CURTISS; E. GAIL DEPLANQUE; FORREST J. REMICK; KENNETH C. ROGERS; UNITED STATES NUCLEAR REGULATORY COMMISSION; and UNITED STATES OF AMERICA,

Respondents,

CONSUMERS POWER COMPANY,

Intervenor/Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Certiorari is warranted in this case to allow this Court to review two important questions raised by the Sixth Circuit's decision in *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995): (1) whether a challenge brought in 1993 to a rule adopted by the Nuclear Regulatory Commission ("NRC") in 1990 is time barred -- when the challenge was brought by persons who were first concretely affected by the rule when it was amended in 1993; and (2) whether the NRC is entitled, under the Nuclear Waste Policy Act ("NWPA"), to permit a utility to store, on a *de facto* permanent basis, high level nuclear waste in concrete casks located outside the reactor building on shifting sand dunes adjoining Lake Michigan, without conducting site-specific public hearings under the Atomic Energy Act ("AEA") or site-specific environmental studies under the National Environmental Policy Act ("NEPA"). Because these questions implicate crucial issues concerning the construction and application of three federal statutes affecting the public health and safety, property rights, and the environment, this Court should grant a writ of certiorari.

In their briefs in opposition, Respondents attempt to portray this case as a routine application of settled administrative law principles. That characterization, which strategically attempts to dissuade the Court from reviewing the questions presented, is well off the mark. This case is anything but routine: The Sixth Circuit's conclusions about the timeliness of Petitioners' claims, as well as the NRC's right to promulgate a rule concerning long-term nuclear waste storage in a manner that forecloses meaningful public input and environmental review, trigger issues with enormous impact for the public at large.

The storage capacity at our nation's reactors rapidly is being exhausted, and landowners adjacent to those plants increasingly will be affected by the 1990 NRC rule, as each of our country's nuclear utilities successively invokes the provisions of the rule and begins storing high level

nuclear waste adjacent to its reactors. In the absence of a long-term solution to the storage of nuclear waste, each reactor site in this country will inevitably become a *de facto* permanent repository well into the next century, if not beyond. The issues presented in this case, therefore, involve significant questions warranting review not only because of their present impact but also because of their effect on future generations.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHEN SUBPART K FIRST CONCRETELY APPLIED TO PETITIONERS.

A. The Sixth Circuit's Decision Conflicts With This Court's Decisions in *Reno* and *Lujan*.

In *Reno v. Catholic Social Services*, 113 S. Ct. 2485, 2496 (1993), this Court reaffirmed long standing precedent that a challenge to a federal regulation is not ripe for review until the impact of that regulation concretely affects the prospective challengers. In *Reno*, as in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-92 (1990), the Court held that a generally applicable rule -- like the rule at issue in this case, the Subpart K regulatory framework adopted by the NRC in 1990 -- cannot be challenged until all steps have been taken applying the regulation to the challengers. *Id.* at 2496. The United States concurs with this reading of *Reno*,[1/] but argues that Petitioners' situation is "precisely the converse" of *Reno* because "no further

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[1/] Consumers also asserts that the Sixth Circuit's analysis regarding the timeliness of Petitioners' challenge to the 1990 rule does not conflict with the prior decisions of this Court in *Reno* and *Lujan*, because those decisions involved questions of ripeness, which Consumers asserts are not in issue here. Contrary to this contention, the ripeness decision in *Reno* is directly in tension with the Sixth Circuit's conclusion that the 1990 rule -- a rule of general applicability for all nuclear power reactors -- created a then-ripe controversy which was judicially reviewable.

steps" were required after Subpart K's promulgation to trigger its application to Petitioners. U.S. Br. at 11.

It is inaccurate to assert, as the United States does, that Subpart K applied to Petitioners in 1990. Although Subpart K granted a general license in 1990, the rule did not and could not apply to Petitioners until it was actually invoked by Consumers. Under the general framework put in effect in 1990, Consumers could not utilize the VSC-24 casks at Palisades until: (1) the NRC issued a Certificate of Compliance to the manufacturer of the casks; (2) Consumers officially notified the NRC of its intent to use the casks at Palisades; and (3) Consumers drafted a modified security and emergency preparedness plan relating to the use of the casks. As Respondents acknowledge in their briefs, these steps were not all accomplished until May 1993. U.S. Br. at 4-5; Consumers Br. at 4-5. Only at that time, when no further steps were necessary for Consumers to use the VSC-24 casks, did the rule concretely apply to Petitioners.

The United States alternatively contends that even if the rule did not yet apply to Petitioners in 1990, it nevertheless applied to them in 1991, when the manufacturer of the VSC-24 casks sought to have the casks placed on the approved list. The United States thus argues that even if Petitioners could not bring a challenge in 1990, they could have done so in 1991. U.S. Br. at 13. However, this contention actually undercuts the United States' position, by acknowledging that there were further steps to be taken after 1990 (including the manufacturer's 1991 application) before the rule could be concretely applied to Petitioners. Of course, as Petitioners have shown, even after 1991, there were "further steps" still necessary over the next two years before Consumers could invoke Subpart K.

Respondents also argue that Petitioners (or certain of them) were aware of Consumers' intentions to use the VSC-24 casks as early as 1990. Respondents suggest that because Petitioners knew of Consumers' plans in 1990, they were required to bring their challenge at that time. Respondents rely upon an August 17, 1990 letter from Consumers to the NRC in which Consumers withdrew its application for a site- specific license to store waste using the VSC-24 casks at Palisades, and advised the NRC of its future intent "to utilize the general license granted in new Subpart K *when it is able to satisfy the conditions of the general license."* U.S. Br. at 4; Consumers Br. at 4 (emphasis added.) However, rather than support Respondents' arguments, this letter again undercuts them. The letter acknowledges on its face that as of August 17, 1990, Consumers had *not* invoked the general license and was *not* in a position to do so. Consequently, Consumers could not satisfy the conditions of the general license in 1990. Even if some of the Petitioners were aware of Consumers' plans for the future, there would have been no ripe controversy until Consumers satisfied those conditions. Thus, not until the VSC-24 cask was actually added to the list in 1993, was Consumers even in a position to invoke Subpart K, and only then was Subpart K amenable to a challenge by Petitioners.

Finally, Respondents' assertions that the *Lujan* decision creates an exception to the case or controversy requirement also miss the mark. In *Lujan,* this Court held that some statutes permit broad regulations to serve as judicially reviewable "agency action." *Lujan,* 497 U.S. at 891. However, the *Lujan* Court did not determine that as soon as a rule becomes reviewable, all challenges to that rule are necessarily ripe for review, irrespective of any Article III barriers that may exist. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992) (Article III jurisdiction is lacking absent a showing that concrete interest is affected).

If, under *Lujan,* all challenges were immediately ripe for review, courts would be saddled with numerous hypothetical disputes. Thus, if Respondents' reading of *Lujan* were correct, every person in the United States who lives or works near a nuclear power plant would have been required in 1990 to bring all possible challenges to the application of Subpart K -- even where, as here, further steps were required before the rule could be concretely applied. That simply is not the law. Certiorari should be granted to resolve each of the issues.

B. The Sixth Circuit's Approach to The Reopener Doctrine Conflicts With Settled Decisions of the D.C. Circuit.

Respondents wrongly assert that the Sixth Circuit's holding is not at odds with D.C. Circuit precedent concerning the NRC's "reopening" of its prior decision. The record demonstrates that the NRC commented extensively about the scope and import of Subpart K when it added the VSC-24 cask to the approved list of casks in 1993. In responding to numerous comments regarding concerns that Subpart K could circumvent public involvement in cask approval decisions, the NRC clarified and expanded upon the original 1990 regulatory scheme. 58 Fed. Reg. 17,949, 17,951, 17,957, 17,959, 17,962-63 (April 7, 1993). Under the D.C. Circuit's reopener decisions, the NRC's extensive comments "reopened" the issue for review. *See, e.g., Public Citizen v. Nuclear Regulatory Com'n,* 901 F.2d 147, 150-51 (D.C. Cir.), *cert. denied sub nom. Nuclear Management and Resources Council, Inc. v. Public Citizen,* 498 U.S. 992 (1990). Like the Sixth Circuit's decision, Respondents essentially ignore these extensive comments.

In addition, Respondents overlook the circuit split between the Sixth and D.C. Circuits. The Sixth Circuit held that the reopener doctrine is inapplicable to this case because

the NRC did not indicate "its intent to reconsider an existing rule." U.S. Br. at 14. This reasoning is directly at odds with the approach taken by the D.C. Circuit, recognizing that an agency may explicitly or implicitly reopen a rule to review through renewed adherence to the rule. *Association of American Railroads v. I.C.C.*, 846 F.2d 1465, 1473 (D.C. Cir. 1988). Because there is a conflict between circuits concerning the governing standard for determining whether an agency has reopened an issue for substantive review, certiorari should be granted.[2/]

II. THIS COURT SHOULD RESOLVE WHETHER THE NUCLEAR WASTE POLICY ACT PERMITS *DE FACTO* PERMANENT STORAGE OF HIGH LEVEL NUCLEAR WASTE WITHOUT SITE-SPECIFIC HEARINGS AND ENVIRONMENTAL REVIEW.

A. Petitioners Are Entitled to an Adjudicatory Hearing under the Atomic Energy Act.

Respondents admit that "[i]t has been the NRC's long-standing administrative practice to grant an adjudicatory hearing opportunity to evaluate *amendments* to a reactor's operating *license.*" Consumers Br. at 22 (emphasis in original). This administrative practice is mandated by the AEA, which requires the NRC to grant adjudicatory hearings when making licensing decisions. 42 U.S.C. § 2239(a)(1)(A). Respondents also admit that the promulgation of Subpart K effectively amended Consumers' operating license, by granting a "general license" to Consumers to store nuclear waste on a long-term basis in

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[2/] Consumers argues that there is no circuit split because the Sixth Circuit did not acknowledge a conflict between its decision and D.C. Circuit precedent, instead finding the reopener cases to have "no bearing" on this case. *Kelley*, 42 F.3d at 1515 n.3. Consumers' argument is purely semantic. The Sixth Circuit's drastically different application of a settled legal doctrine constitutes a conflict.

concrete casks outside the reactor building at Palisades. Consumers Br. at 2, 22. In these circumstances, Petitioners are entitled to an adjudicatory hearing under the AEA because Subpart K, invoked by Consumers in 1993, granted a general license which amended Consumers' operating license at Palisades to allow the storage of nuclear wastes in VSC-24 casks.

Nonetheless, the Sixth Circuit concluded that Petitioners are not entitled to a hearing because the addition of the VSC-24 casks to the approved list of casks in 1993 purportedly did not constitute a licensing decision. *Kelley*, 42 F.3d at 1515. This conclusion underscores the harm Petitioners' have suffered: Petitioners were not entitled to a hearing in 1990, under the rationale of *Reno* and *Lujan*, because they did not have a ripe challenge at that time; and Petitioners were not entitled to a hearing in 1993, under the Sixth Circuit's reasoning, because there was no licensing decision at that time. The confluence of these circumstances has foreclosed Petitioners from any opportunity for an adjudicatory hearing on the use of the VSC-24 casks at Palisades.

As Petitioners have demonstrated, however, this dilemma is properly resolved by the recognition that there was, in fact, a licensing decision in 1993. It was at that time that the NRC determined that Consumers had satisfied all of the conditions of the general license available under Subpart K. Consequently, when Consumers' operating license was effectively amended in 1993 to allow the storage of high level nuclear wastes in VSC-24 casks at Palisades, Petitioners were entitled to an adjudicatory hearing, under long-standing administrative practice mandated by the AEA, to evaluate the impact of that amendment. Certiorari should therefore be granted to resolve this dilemma created by the Sixth Circuit's decision.

Respondents also contend that the AEA hearing requirement is overridden by the NWPA, which, they argue, grants the NRC discretion to approve nuclear waste storage facilities at reactors on a generic basis, without the need for site-specific hearings.[3/] However, Respondents misread the NWPA, which expressly limits the NRC's "generic approval" power. As the United States acknowledges: "The NWPA . . . called upon the NRC to establish procedures for the generic approval of standardized spent fuel technologies 'without, *to the maximum extent practicable,* site-specific approvals.'" U.S. Br. at 14 (citing 42 U.S.C. § 10198(a); emphasis added). By granting the NRC approval power only "to the maximum extent practicable," Congress allowed the NRC to make certain generic decisions, but limited the NRC's authority to matters for which it is practicable for the NRC to consider issues on a generic basis. In particular, as reflected in the NWPA's legislative history, Congress understood that it would not be practicable for the entire storage approval process to proceed without examining site-specific safety characteristics. *See* H. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 41 (1982). Because the NWPA expressly provides that certain decisions are beyond the purview of generic rulemaking, the NWPA does not trump the AEA's requirement that adjudicatory hearings be held in connection with licensing amendments.

B. The NRC Should Have Considered the Environmental Impact of Placing VSC-24 Casks at Palisades.

Under NEPA, all federal agencies, including the NRC, must consider the environmental impacts of proposed

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[3/] The United States' alternative contention that the NRC has satisfied the AEA's "hearing" requirement is unavailing. *See* U.S. Br. at 15. The NRC's three-hour informational meeting, which did not provide Petitioners a forum to make substantive comments, clearly was not adjudicatory in nature.

agency actions, and, where significant, prepare environmental impact statements ("EIS") before carrying out those actions. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). In determining whether an EIS is necessary, the agency must first prepare an environment assessment ("EA"). 40 C.F.R. § 1508.9(a)(1). However, the NRC prepared neither an EA nor an EIS concerning the long-term storage of high level nuclear waste in VSC-24 casks outside the Palisades plant, 150 yards from Lake Michigan.

In holding that the NRC was not required to conduct a site-specific EA for the use of VSC-24 casks at Palisades, the Sixth Circuit ruled that the preapproval of concrete casks was a generic rulemaking that merely required a generic EA. *Kelley,* 42 F.3d at 1520. This conclusion conflicts with *Limerick Ecology Action v. U.S. Nuclear Regulatory Com'n,* 869 F.2d 719, 738 (3d Cir. 1989), in which the Third Circuit recognized that a generic EA "will not suffice where the underlying issues are not generic. . . [or are] insufficiently generic." In fact, there are numerous site-specific safety issues implicated by the use of VSC-24 casks at Palisades that mandate NEPA compliance: the feasibility of placing high-level nuclear wastes in concrete casks 150 yards from Lake Michigan; modifying security and emergency plans; and analyzing whether sand dunes can safely hold the weight of the 130 ton casks. These same concerns have been recognized by Valdas Adamkus, the EPA Administrator for Region V,[4/] as well as Dr. Ross Landsman, an NRC soils expert. In light of these site-specific issues, which concern the storage of nuclear waste in VSC-24 casks outside of the Palisades plant

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[4/] In its brief, Consumers misleadingly refers to Mr. Adamkus as "an EPA employee." Consumers Br. at 27 n. 16. Actually, as Administrator of EPA Region V, Mr. Adamkus is the most important EPA official in the Midwest Region of the EPA.

on the shores of Lake Michigan, and which the NRC has itself recognized, the NRC should have performed site-specific environmental analyses required by NEPA. In failing to so hold, the Sixth Circuit strayed from settled precedent.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, Petitioners respectfully request this Court to grant a writ of certiorari on the questions presented.

Respectfully submitted,

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